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Nos. 80-1770 & 80-1791

IN THE

Supreme Court of the United States

October Term, 1980

RALPH D. TURLINGTON, Commissioner of Education, State of Florida, *et al.*,

Petitioners,

v.

S-1, a Minor, by and through His Mother and Next Friend, P-1, *et al.*,

Respondents.

JAMES C. EDWARDS, Individually, and in His Official capacity as Superintendent of Schools, Hendry County, Florida, *et al.*,

Petitioners,

v.

S-1, a Minor, by and through His Mother and Next Friend, P-1, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS CASE No. 80-1791

JOHN W. BOWEN
(Counsel of Record)
25 South Magnolia Avenue
Orlando, Florida 32802
(305) 843-5260
Attorney for Petitioners
JAMES C. EDWARDS, *et al.*

Of Counsel:
John H. King
James H. Monroe, Jr.
Bowen & King

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QUESTION PRESENTED

1. Has the case become moot as the result of the Preliminary Injunction having been fully and irrevocably carried out?

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THE CASE IS NOT MOOT

The Court has directed all counsel to file supplemental briefs addressing the issue of whether or not the case has become moot. It is clear from the law, as enunciated by this Court, in *University of Texas v. Camenisch,*

____US____, 101 S.Ct. 1830, 68 L.Ed.2d 175 (April, 1981), as well as the facts of this case that the case is not moot and certiorari should be granted.

In *University of Texas v. Camenisch*, this Court was asked to review the decision of the Fifth Circuit Court of Appeals holding that the District Court did not abuse its discretion in granting a preliminary injuction against the University of Texas. The preliminary injunction, interpreting Section 504 of the Rehabilitation Act of 1973, 29 USC 794 (Supp. III 1979), required that the University pay for a sign language interpreter for Camenisch, a deaf graduate student.

The Fifth Circuit had rejected an argument that the case was moot because Camenisch had already graduated and he had received the relief he had sought. The preliminary injunction was therefore no longer in effect. The Court reasoned that there was, nevertheless, still a justiciable issue as to which party must pay for the interpreter and the case was not moot, particularly since Camenisch had to post bond that could be used to repay if he lost the Appeal. *Camenisch v. University of Texas*, 616 F2d 127 (1980).

This Court reversed, pointing out that the only issue on appeal was whether or not there had been an abuse of discretion in issuing the preliminary injunction. Since the terms of the injunction had been fully and irrevocably carried out, then that question was moot. The question of which party pays for the sign language interpreter should be decided in a full trial on the merits in the District Court, not on appeal.

But in the present case, the preliminary injunction has not been fully and irrevocably carried out. It remains in full force and effect. It was not an injunction that was ad-

dressed to stopping the original expulsions before they had already run their course. If it had been, then there might be some question as to whether or not the injunction had expired by its own terms when the expulsions would have ended anyway without the injunction.

To the contrary, this preliminary injunction did not address past expulsions, but addressed how the school district would handle future expulsions with respect to these plaintiffs. While the preliminary injunction does not specifically address expulsions, it does require that the plaintiffs be provided with all the rights that they are entitled to under the Education for All Handicapped Children Act. These rights would be as interpreted by the District Court and as expanded by the Fifth Circuit. Clearly, one aspect of the plaintiffs' rights under this act as interpreted by the Fifth Circuit is that the plaintiffs can never lose the right to educational services no matter what their misconduct and no matter what their handicap. No matter what the circumstances, the Fifth Circuit requires that a handicapped student never lose the right to educational services even during the term of an "expulsion".

The preliminary injunction issued by the District Court continues to operate to prevent the local official defendants from utilizing the disciplinary tool of expulsion as defined in Section 228.041 (26), Fla. Stat. (1980 Supp.) with respect to the individual plaintiffs. The injunction continues because all but one of the plaintiffs are still in school or entitled to be in school.

The local official defendants have maintained at every stage of this litigation, and still maintain that they have the right under the Education for All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973 to expel plaintiffs or any other handicapped students

for misconduct which would justify the expulsion of non-handicapped students. The local official defendants have at all times maintained and still maintain that expulsion would mean the total loss of the right and obligation for a student to attend public schools and have educational services provided. This would be the same for non-handicapped as well as handicapped students. But for the continuing effect of the preliminary injunction, the local official defendants would subject plaintiffs to the same disciplinary procedures as all other students. *Cf. Defunis v. Odegaard*, 416 US 312 (1974).

Not only is this case not moot with respect to the plaintiffs still in school or entitled to be in school, but this injunction, as expanded by the opinion of the Fifth Circuit, operates in reality to enjoin the local school district from expelling any handicapped child within the school district for misconduct which would justify the expulsion of a non-handicapped child. Local school officials would subject themselves to individual liability if they treated a handicapped child the same way they treated a non-handicapped child in expulsion procedures so long as the opinion of the Fifth Circuit remains undisturbed. See, *Wood v. Strickland*, 420 US 308 (1975).

Additionally, since the Fifth Circuit ruled that the state defendants had an obligation to enforce the rights as interpreted by the Court, then the decision has the collateral effect of prohibiting expulsion for any handicapped student in the State of Florida. Indeed the Fifth Circuit's opinion would have a continuing collateral effect not only throughout its jurisdiction, but throughout the nation. So long as that decision stands, educators would be ill-advised to attempt to subject handicapped students to the same disciplinary procedures as all other students regardless of the handicapping condition and regardless

of the misconduct involved. This Court recognises that such collateral effects should he considered in determining whether a controversy is moot. See, *Southern Pacific Co., v. ICC*, 219 US 433 (1911).

It is clear, therefore, that the preliminary injunction in the present case has not been fully and irrevocably carried out, but rather is still in full force and effect and will remain so until further court action. It continues to be a live, active case or controversy not only with respect to the parties to the litigation, but continues to have an impact far beyond the current case. As a result there is still a viable issue for this Court to determine with respect to whether or not the preliminary injunction should have been entered as ordered by the District Court and as further expanded by the Fifth Circuit.

If this case were not reviewed now, then it would become clearly one which would be capable of repetition but evading review. Unless litigation and appeal were expedited to an extent that might not be possible, any future case might present facts that involve not only the expulsion being complete, but the student plaintiff having been graduated and no longer entitled to educational services. Even under such circumstances this Court could still review such a case under the rationale of *Roe v. Wade*, 410 US 113 (1973). See also, *Southern Pacific Terminal Company v. ICC*, 219 US 498 (1911).

But in the present case the *Roe v. Wade* rationale need not be invoked. There is still a case or controversy between the parties to this litigation. The injunction still has the effect of preventing the local official defendants from subjecting the plaintiffs to the school system's expulsion procedures while they are still in school or entitled to be in school. The present case is clearly not moot.

Wherefore this Court should grant certiorari to detemine whether or not the preliminary injunction should have been granted.

Respectfully submitted,

JOHN W. BOWEN
(Counsel of Record)
25 South Magnolia Avenue
Orlando, Florida 32802
(305) 843-5260

Attorney for Petitioners
JAMES C. EDWARDS, *et al.*

Of Counsel:

John H. King
James H. Monroe, Jr.
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